283-406-50

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1905.

No. 266.

P. O. COX, SAM LEVY AND W. M. EVANS,
PLAINTIFFS IN ERROR,

vs.

THE STATE OF TEXAS.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This is a suit for the recovery of statutory penalties for breach of a liquor dealer's bond. The plaintiff in error P. O. Cox is the principal in the bond, and the other plaintiffs in error are the sureties. The petition charges that the plaintiff in error P. O. Cox breached the bond by permitting W. W. Thompson, a minor, to enter and remain in his saloon on six different, distinct and separate occasions, and by selling and giving, and permitting to be sold and given to said W. W. Thompson, in said saloon, spirituous, vinous and malt liquors, and medicated bitters. (Tr., p. 4.)

The verdict was rendered and judgment given against plaintiffs in error for three infractions of the bond for allowing said minor

to enter and remain in said saloon in the sum of $500.00 each, aggregating $1,500.00 (Tr., p. 35.)

The plaintiffs in error, being defendants in the trial court, answered by general and special demurrer, attacking the constitutionality of the Act giving the right of action in favor of the State on the ground that the Act exempted from its provisions people engaged in the same business. (Tr., p. 5.)

The demurrers were overruld by the court and the case went to trial upon its merits, resulting in a judgment as above stated. Plaintiffs in error filed a motion for a new trial, which was overruled. (Tr., p. 38.)

The case was taken on appeal to the Court of Civil Appeals for the Third Supreme Judicial District of Texas, and the judgment of the lower court was affirmed. (Tr., p. 47.)

A motion for rehearing was filed in the Court of Civil Appeals, which was overruled. (Tr., p. 52.)

An application for writ of error was made to the Supreme Court of the State, which was refused, (Tr., p. 63), and the case comes by writ of error to this court for review upon the questions raised, that the Act is unconstitutional and violative of the Fourteenth Amendment to the Constitution of the United States in that it denies to plaintiff in error the equal protection of the laws.

Plaintiff in error P. O. Cox, on the 22nd day of May, 1902, made application for license to sell spirituous, vinous or malt liquors, or medicated bitters in quantities of one gallon or less to be drunk on the premises in compliance with Article 5060c, Revised Statutes of 1895, of the State of Texas. (Tr., p. 8.)

Plaintiff in error P. O. Cox entered into bond with plaintiffs in error Sam Levy and W. M. Evans, as sureties, in compliance with the provisions of Article 5060g, Revised Statutes of Texas, 1895. (Tr., p. 9.)

The constitutional questions raised here were decided by the Court of Civil Appeals for the Third Supreme Judicial District of this State adversely to the contention of plaintiffs in error. (Cox v. State, 85 S. W. Rep., 1199; Cox v. Thompson, 85 S. W. Rep., 34.)

The assignments of error relied upon by plaintiffs in error in this court are as follows:

FIFTH ASSIGNMENT OF ERROR.

The court erred in holding that the provisions of said Act do not

cast special burdens upon those engaged in the sale of wine manufactured from grapes, or other fruits, or of spirituous, vinous or malt liquors, or medicated bitters capable of producing intoxication, not cast on those engaged in the sale of wine manufactured from grapes grown in Texas while in the hands of the producers or manufactureres thereof.

SEVENTH ASSIGNMENT OF ERROR.

The court erred in holding that said Act does not grant special and exclusive privileges to certain citizens which it denies to plaintiffs in error, and to other citizens in the State.

FOURTH ASSIGNMENT OF ERROR.

The court erred in holding that the provisions of said Act and the amendments thereto do not unlawfully discriminate between those engaged in selling spirituous, vinous or malt liquors, or medicated bitters capable of producing intoxication, or in the selling of wines manufactured from other fruits and grapes, or in the selling of wines manufactured from grapes grown in Texas while not in the hands of manufacturers or producers thereof, as contradistinguished from those engaged in the sale of wines manufactured from grapes grown in Texas while in the hands of the producers or manufacturers thereof, which latter class is exempt from giving bonds and from incurring penalties for violating the conditions thereof as provided for in said Act. (Tr., p. 76; brief of plaintiffs in error, page 8.)

BRIEF.

First Counter Proposition Under the Fifth, Seventh and Fourth Assignments of Error of Plaintiffs in Error.

1.

THERE IS NO INHERENT RIGHT IN A CITIZEN TO SELL INTOXICATING LIQUORS. IT IS NOT A PRIVILEGE OF A CITIZEN OF A STATE, OR OF A CITIZEN OF THE UNITED STATES WHICH THE STATES ARE FORBIDDEN

TO ABRIDGE. IT IS A RIGHT EXERCISABLE ONLY SUBJECT TO THE POLICE POWERS OF THE STATE.

STATEMENT.

Revised Statutes of Texas of 1895:

"Art. 5060c. PREREQUISITES TO THE ISSUE OF LICENSE TO SELL. Every person, firm, corporation, or association of persons, desiring to engage in the sale of spirituous, vinous or malt liquors, or medicated bitters capable of producing intoxication, in this State, as set forth in Article 5060a of this Chapter, shall, before commencing the sale of such liquors or medicated bitters, file with the county clerk of the county in which he or they propose to sell the same, an application, under oath, on forms provided by the Comptroller, and shall designate the place in which it is proposed to engage in the sale of such liquors or medicated bitters, if (in) any city or town in which streets are named and houses numbered, the street and number of house shall be given, and the quantities in which he or they propose to sell, whether one gallon or more, or one gallon and less than a gallon, or whether they desire to sell malt liquors exclusively."

Plaintiff in error P. O. Cox made application for license under the provisions of this Article. (Tr., p. 8.)

"Art. 5060g. LICENSEE TO EXECUTE BOND; CONDITIONS OF BOND, ETC. Any person, firm or association of persons desiring to engage in the sale of spirituous, vinous or malt liquors, or medicated bitters capable of producing intoxication, to be drunk on the premises, shall, before engaging in such sale, be required to enter into bond in the sum of five thousand dollars; provided, however, that any person, firm or corporation of persons dealing exclusively in malt liquors shall be required to give bond only in the sum of one thousand dollars, with at least two good, lawful and sufficient sureties, payable to the State of Texas, to be approved by the county judge, conditioned that said person, firm, or association of persons so selling spirituous, vinous or malt liquors, or medicated bitters capable of producing intoxication, in any quantity, to be drunk on the premises, shall keep an open, quiet, and orderly house, or place for the sale of spirituous, vinous or malt liquors, or medicated bitters capable of producing intoxication; and that such person, firm or association of persons, or his or their agent or employe, will not sell nor permit to be sold in his or their

house or place of business, nor give nor permit to be given, any spirituous, vinous or malt liquors, or medicated bitters capable of producing intoxication, to any person under the age of twenty-one years, or to a student of any institution of learning, or to any habitual drunkard, or to any person after having been notified in writing, through the sheriff or other peace officer, by the wife, mother, daughter, or sister of the person, not to sell to such person; and that he or they will not permit any person under the age of twenty-one years to enter and remain in such house or place of business; and that he or they will not permit any games prohibited by the laws of this State to be played, dealt, or exhibited in or about such house or place of business; and that he or they will not rent or let any part of the house or place in which he or they have undertaken to sell spirituous, vinous or malt liquors, or medicated bitters capable of producing intoxication, in any quantity, to be drunk on the premises, to any person or persons for the purpose of running or conducting any game or games prohibited by the laws of this State; and that he or they will not adulterate the liquors sold by them in any manner, by mixing with the same any drug; and that he or they will not knowingly sell or give away any impure or adulterated liquors of any kind." * * *

Plaintiffs in error gave bond under the provisions of this Article. (Tr., p. 9.)

AUTHORITIES.

Beer Co. v. Massachusetts, 97 U. S., 25.
Battemeyer v. Louisiana, 18 Wall., 129.
Mugler v. Kansas, 123 U. S., 659.
Foster v. Kansas, 112 U. S., 206.
Norton v. Jamison, 151 U. S., 591.
Crowley v. Christensen, 137 U. S., 86.
Giozza v. Tiernan, 148 U. S., 657.
Kidd v. Pearson, 128 U. S., 1.

ARGUMENT.

The caption of the Act under which this suit was brought is as follows:

"An Act to *regulate* the sale of spirituous, vinous or malt liquors, or medicated bitters; to fix a *tax* upon all persons or associations of

persons selling such liquors; to define the time and manner of *collecting such tax;* to fix *penalties* for the violation of this Act, and to repeal all laws and parts of laws in conflict with the provisions of this Act." (Acts of Leg. of 1893, p. 177.)

Counsel for plaintiffs in error have made the following concession:

"Now we do not contend that this Act is void as to the features contained in it with reference to taxation, * * * but we do contend that the Act in so far as it prescribes regulations, amongst others, to wit, the giving of the bond sued on, is void." (Brief, p. 36.)

If the taxing features of the Act are not repugnant to the Fourteenth Amendment to the Constitution of the United States, neither are the police regulations, contained in the Act, violative of that amendment. This court has expressly held that "the police power of a State is as broad and plenary as its taxing power; and property within the State is subject to the operations of the former so long as it is within the regulating restrictions of the latter." (Kidd v. Pearson, 128 U. S., 26.)

We direct the court's attention to the following cases:

BARTHEMEYER V. IOWA.

(18 Wall., 129.)

"But the most liberal advocate of the rights conferred by that amendment have contended for nothing more than that the rights of the citizen previously existing, and dependent wholly on State laws for their recognition, are now placed under the protection of the Federal Government, and are secured by the Federal Constitution. The weight of authority is overwhelming that no such immunity has heretofore existed as would prevent State legislatures from regulating and even prohibiting the traffic in intoxicating drinks, with a solitary exception. That exception is the case of a law operating so rigidly on property in existence at the time of its passage, absolutely prohibiting its sale, as to amount to depriving the owner of his property. A single case, that of Wynehamer v. The People, has held that as to such property the statute would be void for that reason. But no case has held that such a law was void as violating the privileges or immunities of citizens of a State or of the United States. If, however, such a proposition is seriously urged, we think that the right to sell intoxicating liquors, so far

as such a right exists, is not one of the rights growing out of citizenship of the United States.

GIOZZA V. TIERNAN.

(148 U. S., 657.)

"Irrespective of the operation of the Federal Constitution and restrictions asserted to be inherent in the nature of American institutions, the general rule is that there are no limitations upon the legislative power of a Legislature of a State, except those imposed by its written Constitution. There is nothing in the Constitution of Texas restricting the power of the Legislature in reference to the sale of liquor, and it is well settled that the Legislature of that State has the power to regulate the mode and manner and the circumstances under which the liquor traffic may be conducted, and to surround the right to pursue it with such conditions, restrictions and limitations as the Legislature may deem proper. Ex parte Bell, 24 Texas App., 128; Bell v. State, 28 Texas App., 96. In these cases and in the case before us, the law in question was held to be within the legislative power; and, so far as the State Constitution is concerned, that conclusion is not re-examinable here. But it is contended that the Act conflicts with the provisions of the Fourteenth Amendment, that, 'no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall and State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'

"The privileges and immunities of citizens of the United States are privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the Constitution of the United States, and the right to sell intoxicating liquors is not one of the rights growing out of such citizenship. Bartemeyer v. Iowa, 18 Wall., 129."

CROWLEY V. CHRISTENSEN.

(137 U. S., 86.)

"It is undoubtedly true that it is the right of every citizen of the United States to pursue any lawful trade or business, under

such restrictions as are imposed upon all persons of the same age, sex and condition. But the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is then liberty regulated by law. The right to acquire, enjoy and dispose of property is declared in the constitutions of several States to be one of the inalienable rights of man. But this declaration is not held to preclude the legislature of any State from passing laws respecting the acquisition, enjoyment any disposition of property."

And again the court in the same case says:

"It is urged that, as the liquors are used as a beverage, and the injury following them, if taken in excess, is voluntarily inflicted, and is confined to the party offending; their sale should be without restrictions, the contention being that what a man shall drink, equally with what he shall eat, is not properly matter for legislation.

"There is in this position an assumption of a fact which does not exist, that when the liquors are taken in excess the injuries are confined to the party offending. The injury, it is true, first falls upon him in his health, which the habit undermines; in his morals, which it weakens; and in the self-abasement, which it creates. But, as it leads to neglect of business and waste of property and general demoralization, it affects those who are immediately connected with and dependent upon him. By the general concurrence of opinion of every civilized and christian community, there are few sources of crime and misery to society equal to the dram shop, where intoxicating liquors, in small quantities, to be drunk at the time, are sold indiscriminately to all parties applying. The statistics of every State show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these retail liquor saloons than to any other source. The sale of such liquors in this way has therefore been, at all times, by the courts of every State, considered as the proper subject of legislative regulation. Not only may a license be exacted from the keeper of a saloon before a glass of his liquors can be thus disposed of, but

restrictions may be imposed as to the class of persons to whom they may be sold, and the hours of the day and the days of the week on which the saloons may be opened. Their sale in that form may be absolutely prohibited. It is a question of public expediency and public morality, and not of federal law. The police power of the State is fully competent to regulate the business—to mitigate its evils or suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the State or of a citizen of the United States. As it is a business attended with danger to the community, it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils."

2.

TITLE CIV, CHAPTER 1-A, REVISED STATUTES OF THE STATE OF TEXAS OF 1895, AND THE AMENDMENT THERETO, BY THE ACT OF 1897, ARE NOT REPUGNANT TO THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

STATEMENT.

The statutes under which this suit was brought consist of the Act of 1893, and the amendment thereto of 1897.

The Act of 1893 in full is as follows:

LIQUORS—SALE OF REGULATED—TAXATION.

CHAP. 121.—(H. B. No. 91.) An act to regulate the sale of spirituous, vinous, or malt liquors, or medicated bitters; to fix a tax upon all persons or associations of persons selling such liquors; to define the time and manner of collecting such tax; to fix penalties for the violation of this act, and to repeal all laws and parts of laws in conflict with the provisions of this act.

SECTION 1. *Be it enacted by the Legislature of the State of Texas*: That hereafter there shall be collected from every person, firm or association of persons selling spirituous, vinous, or malt liquors, or medicated bitters, within this State, an annual tax on each separate establishment as follows: For selling spirituous,

vinous, or malt liquors in quantities of one gallon or less than one gallon, three hundred dollars; for selling such liquors in quantities of one gallon or more than one gallon, three hundred dollars; Provided, that in selling one gallon, the same may be made up of different liquors in unbroken packages, aggregating not less than one gallon. For selling malt liquors exclusively, fifty dollars: Provided, that nothing in this section shall be so construed as to exempt druggists who sell spirituous, vinous, or malt liquors, or medicated bitters, on the prescription of a physician, or otherwise, from the payment of the tax herein imposed: Provided further, that this section shall not apply to the sale by druggists of tinctures and drug compounds in the preparation of which spirituous, vinous, or malt liquors are used, and which compounds are not intoxicating beverages prepared in evasion of the provisions of this act.

SEC. 2. That the commissioners court of the several counties in this State shall have the power to levy and collect from every person or association of persons selling spirituous, vinous, or malt liquors, or medicated bitters, a tax equal to one-half the State tax herein levied; and where any such sale is made in any incorporated city or town, such city or town shall have the power to levy and collect a tax upon such sale equal to that levied by the commissioners court of the county in which such city or town is situated.

SEC. 3. That every person, firm, or association of persons desiring to engage in the sale of spirituous, vinous, or malt liquors, or medicated bitters, shall, before he or they commence the sale of such liquors or medicated bitters, file with the county clerk of the county in which he or they propose to sell such spirituous, vinous, or malt liquors, or medicated bitters, an application for license to engage in the sale of such liquors or medicated bitters. Said application shall be made on oath, on forms to be provided by the Comptroller, and shall designate the place at which it is proposed to carry on the sale of such liquors or medicated bitters; if in a city, the street and number of the house shall be given and the quantities in which he or they propose to sell, whether one gallon or more than one gallon, or one gallon and less than one gallon, or whether they desire to sell malt liquors exclusively; and shall also state in said application whether or not the said liquors are to be sold to be drunk on the premises; and shall pay

to the collector of taxes of the county in which he or they propose to sell such spirituous, vinous, or malt liquors, or medicated bitters, the entire annual tax herein levied, according to the quantities in which he or they propose to sell, and the entire annual tax upon such business, as may be levied by the commissioners court of such county, and file with the county clerk bond as required in section nine of this act. In case the selling of such liquors or medicated bitters be carried on in a city or incorporated town, he or they so selling shall, in addition to the State and county tax herein required to be paid, pay to collector of taxes in such city or town such tax as may be levied on said business by such city or town, and all taxes herein levied shall be paid in advance. All licenses issued under the provisions of this act shall be posted by the licensee in a conspicuous place in his or their place of business, and on failure to so post such license, he or they so failing shall be considered as having no license.

SEC. 4. That upon filing the sworn application as provided in section 3, and paying to the collector the annual State and county tax herein provided for, and filing such bond as is required by section 9, the county clerk of said county shall issue to said applicant a license to sell spirituous, vinous, or malt liquors, or medicated bitters, at the place and in the manner and quantities set forth in the application, and no sale shall be made until such license is procured. The receipt of the tax collector shall be evidence of the payment of the tax. For issuing licenses herein provided for, county clerks shall be entitled to charge a fee of twenty-five cents for each license.

SEC. 5. That no license shall be granted for a longer or shorter period than one year. The particular place and house in which the liquors are to be sold shall be designated in the license, and no license shall authorize any person to sell spirituous, vinous, or malt liquors, or medicated bitters, at any other place or house than that designated in the license: Provided, that if any person or association of persons having a license to sell such liquors, desires to change his or their place of business, such change may be made by presenting the license to the clerk of the county and having the new place of business inserted therein, but in no case to admit of the temporary closing of one place of business to sell at another place.

SEC. 6. That any person or association of persons who shall

engage in the sale of spirituous, vinous, or malt liquors, or medicated bitters, without having obtained license therefor, shall be fined any sum not less than the amount of the taxes so due and not more than double that sum, or imprisoned in the county jail from ten to ninety days, in the discretion of the jury. And any person or persons who shall sell spirituous, vinous, or malt liquors, or medicated bitters, in quantities not authorized by his or their license, or who shall sell in any other place than that designated in the license, or who shall sell otherwise than authorized by the license, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum from fifty to one hundred dollars, or imprisoned in the county jail from ten to thirty days, in the discretion of the jury: Provided, that each day any person, firm, or association of persons, in his or their employ, shall engage in the sale of spirituous, vinous, or malt liquors, or medicated bitters, in violation of this act shall constitute a separate offense.

SEC. 7. That the payment of the United States special tax as a seller of spirituous, vinous, or malt liquors shall be held to be prima facie evidence that the person or persons paying such tax are engaged in selling such liquors.

SEC. 8. That the county clerk in each and every county in this State shall, between the first and tenth day in each month, forward to the State revenue agent a sworn statement, giving the names of all persons who have filed applications for license during the preceding month, and the tax collector of each county shall keep a register in which shall be entered the names of all persons paying taxes under this act, with the date of payment, and shall, between the first and tenth day of each month, make to the State revenue agent a sworn report, giving the names of all persons who have paid a liquor tax during the preceding month, and the character of tax paid by each. The reports provided for in this section shall be made upon blank forms to be furnished by the Comptroller.

SEC. 9. That any person, firm, or association of persons desiring to engage in the sale of spirituous, vinous, or malt liquors, or medicated bitters capable of producing intoxication, to be drunk on the premises, shall, before engaging in such sale, be required to enter into bond in the sum of five thousand dollars: Provided, however, that any person, firm, or corporation of persons dealing exclusively in malt liquors shall be required to give bond only in

the sum of one thousand dollars, with at least two good, lawful, and sufficient sureties, payable to the State of Texas, to be approved by the county judge, conditioned that said person, firm, or association of persons so selling spirituous, vinous, or malt liquors, or medicated bitters capable of producing intoxication, in any quantity, to be drunk on the premises, shall keep an open, quiet, and orderly house or place for the sale of spirituous, vinous, or malt liquors, or medicated bitters capable of producing intoxication; and that such person, firm, or association of persons, or his or their agent or employe, will not sell nor permit to be sold in his or their house or place of business, nor give nor permit to be given, any spirituous, vinous, or malt liquors, or medicated bitters capable of producing intoxication, to any person under the age of twenty-one years, or to a student of any institution of learning, or to any habitual drunkard, or to any person after having been notified in writing, through the sheriff or other peace officer, by the wife, mother, daughter, or sister of the person, not to sell to such person; and that he or they will not permit any person under the age of twenty-one years to enter and remain in such house or place of business; and that he or they will not permit any games prohibited by the laws of this State to be played, dealt, or exhibited in or about such house or place of business; and that he or they will not rent or let any part of the house or place in which he or they have undertaken to sell spirituous, vinous, or malt liquors, or medicated bitters capable or producing intoxication, in any quantity, to be drunk on the premises, to any person or persons for the purpose of running or conducting any game or games prohibited by the laws of this State; and that he or they will not adulterate the liquors sold by them in any manner, by mixing with the same any drug; and that he or they will not knowingly sell or give away any impure or adulterated liquors of any kind; which said bond shall be filed in the office of the county clerk of the county where the business is conducted, and shall be recorded by such clerk in a book to be kept for such purpose, for which service the said clerk shall be entitled to a fee of seventy-five cents; which said bond may be sued on at the instance of any person or persons aggrieved by the violation of its provisions, and such persons shall be entitled to recover the sum of five hundred dollars as liquidated damages for each infraction of the condition of such bond, and the said bond shall not be void on the first re-

covery, but may be sued on until the full penal sum named therein shall have been recovered. In addition to civil proceedings for individual injuries, brought on said bond as above indicated, if any person, firm, or association of persons shall violate any of the conditions of the bond herein required, it shall be the duty of the county and district attorneys, or either of them, to institute suit thereupon in the name of the State of Texas, for the use and benefit of the county, and the amount of five hundred dollars as a penalty shall be recovered from the principals and sureties upon a breach of any of the conditions thereof; and whenever the first or subsequent bond as required is exhausted by suit at the instance of individuals, or for the use of the county, a new similar bond shall be given and approved before the dealer shall have the right to further pursue the business of a liquor seller; or, in case suit is pending on any such bond, and the county or district attorney shall make and file an affidavit with the clerk of the county court that he believes the bond of the defendant will be exhausted by said suit, the clerk shall at once notify the liquor dealer thereof, and it shall be the duty of the liquor dealer, within twenty days from the time the bond is exhausted, or, in other event, within twenty days from the time the notice is given, to give a new bond similar to the bond first given, to be approved in the same way; and until such new bond is given and approved, when it is required by this act, the liquor seller shall not have the right to further pursue the business of selling liquors; and any person, firm, or association of persons who shall sell liquors, in any quantity, to be drunk on the premises, without giving the first bond, or the new bond, as required by this act, shall be deemed guilty of a misdemeanor, and on conviction shall be fined the same amount provided for in cases where no license has been obtained. An open house, in the meaning of this act, is one in which no screen or other device is used or placed either inside or outside of such house or place of business for the purpose of or that will obstruct the view through the open door or place of entrance into any such house or place where intoxicating liquors are sold to be drunk on the premises. A quiet house or place of business, in the meaning of this act, is one in which no music, loud or boisterous talking, yelling, or indecent or vulgar language is allowed, used, or practiced, or any other place calculated to disturb or annoy any persons residing or doing business in the vicinity of such house or place of business, or those

passing along the streets or public highways. By an orderly house is meant one in which no prostitute or lewd woman or women are allowed to enter or remain: And it is further provided, that said house must not contain any vulgar or obscene pictures. Any surety on such bond may relieve himself from further liability thereon by giving the principal in said bond notice in writing that he will no longer remain as surety on said bond and by filing with the county judge an affidavit that such notice has been given, and if within five days after such notice if he fail to make a new bond, he shall cease to pursue said business until a new bond is given. And any person who shall continue to pursue said business after such affidavit is filed shall be guilty of a misdemeanor, and shall be punished as provided in cases where no license has been procured: Provided, that where the sale is made in good faith, with the belief that the minor was of age, and there is good ground for such belief, that shall be a valid defense to any recovery on such bond.

SEC. 10. That any tax collector, sheriff, deputy sheriff, constable, or other peace officer, having knowledge of the violation of this act, shall report the same to the county attorney, who shall forthwith prosecute any person or persons violating the provisions of this act; and any tax collector whose attention has been called to an instance in which the provisions of this act appear to have been violated, shall investigate the particular case, and if it is found this act has been violated, report the fact to the county attorney or district attorney.

SEC. 11. That any officer who shall willfully refuse or neglect to perform the duties required of him by the provisions of this act shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum from one hundred to five hundred dollars, and may be dismissed from office.

SEC. 12. That all receipts issued by tax collectors for taxes paid under this act shall be made on blanks prepared by the Comptroller, and any tax collector who shall issue a manuscript receipt for taxes herein levied, or use any form of receipt other than that furnished him by the Comptroller, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished as provided in section 11 of this act.

SEC. 13. An habitual drunkard, within the meaning of this act, is one who makes it a habit, or who habitually becomes intox-

icated by the voluntary use of intoxicating liquors; and in all suits for the breach of such bond for unlawfully selling to an habitual drunkard, the question whether or not such person is an habitual drunkard shall be determined by the court or jury trying such case, as any other fact.

SEC. 13a. The provisions of this act shall not apply to wines produced from grapes grown in this State, while the same is in the hands of the producers or manufacturers thereof.

SEC. 14. All laws and parts of laws in conflict herewith are hereby repealed.

SEC. 15. The evils designed to be remedied by this act creates an emergency and an imperative public necessity for the act to take effect and be in force from and after its passage; and the fact that the Comptroller of Public Accounts is required to send out his blanks by the first day of May, creates an imperative public necessity that this act take effect at once, and it is therefore enacted that this act shall take effect and be in force from and after its passage.

The Act of 1897 in full is as follows:

H. B. No. 686.] CHAPTER 158.

An Act to amend the law in regard to taxation, and to regulate the sale of Liquor, by amending Article 5060a and Article 5060c, of Title 104, Chapter 1a. of the Revised Civil Statutes of Texas, and adding Article 5060j to said chapter.

SECTION 1. *Be it enacted by the Legislature of the State of Texas*: That Articles 5060a and 5060c, of the Revised Civil Statutes of Texas, as described in the caption to this act, be amended so as to hereafter read as follows; and that Article 5060j be added to said chapter, to read as herein expressed:

Article 5060a. Hereafter there shall be collected from every person, firm corporation, or association of persons, selling spirituous, vinous or malt liquors, or medicated bitters capable of producing intoxication, in this State, not located in any county, subdivision of a county, justice precinct, city or town, where local option is in force under the laws of Texas, an annual tax of $300 on each separate establishment, as follows: For selling such liquors or medicated bitters, in quantities of one gallon or less than one

gallon, $300; for selling such liquors or medicated bitters in quantities of one gallon or more than one gallon, $300; provided, that in selling one gallon the same may be made up of different liquors in unbroken packages aggregating not less than one gallon; for selling malt liquors exclusively, $50. And there shall be collected from every person, firm, corporation, or association of persons, for every separate establishment selling such liquors or medicated bitters within this State and located within a county, subdivision of a county, justice precinct, town or city, in which local option is in force under the laws, the sum of $200; provided, the same shall not be sold in such locality except on prescription and in compliance with the laws governing sales in such localities; provided, further, that nothing in this article shall be so construed as to exempt druggists who sell spirituous, vinous, or malt liquors, or medicated bitters capable of producing intoxication, on the prescription of a physician or otherwise in either locality as above set forth from the payment of the tax herein imposed; provided, further, that this article shall not apply to the sale by druggists of tinctures and drug compounds, in the preparation of which such liquors or medicated bitters are used and sold on the prescription of a physician or otherwise, and which tinctures and compounds are not intoxicating beverages prepared in the evasion of the provisons of this chapter nor the local option law.

Article 5060c. Every person, firm, corporation, or association of persons, desiring to engage in the sale of spirituous, vinous, or malt liquors, or medicated bitters capable of producing intoxication, in this State, as set forth in Article 5060a of this chapter, shall, before commencing the sale of such liquors or medicated bitters, file with the county clerk of the county in which he or they propose to sell the same, an application under oath, on forms provided by the Comptroller, and shall designate the place in which it is proposed to engage in the sale of such liquors or medicated bitters, if any city or town in which streets are named and houses numbered, the street and number of house shall be given, and the quantities in which he or they propose to sell, whether one gallon or more, or one gallon and less than a gallon, or whether they desire to sell malt liquors exclusively; provided, in localities where local option is in force not more than one quart shall be sold at one time to the same person; and shall also state in said application whether said liquors or medicated

bitters are to be sold to be drunk on the premises, or to be sold on prescription in a local option county, subdivision of a county, justice precinct, town or city; and shall pay to the collector of taxes of the county in which such sales are to be made the full amount of the annual tax herein levied, and such as may be levied by the commissioners' court of such county and the city or town in which sales are to be made; and shall file with the said clerk a bond as required by Article 5060g and 5060j of this chapter. In case the sales are to be made in a city or incorporated town, the taxes by such city or town shall be paid to the collector of taxes of such city or town. All taxes herein levied or which may be levied by a county, city or town, shall be paid in advance, and upon the payment of same and full compliance herewith, the county clerk of the county shall issue to the person, firm, corporation, or association of persons, a license as provided for in Article 5060j of this chapter, which said license and licenses or receipts for the tax or revenues issued by the United States shall be posted by licensee in a conspicuous place in his or their place of business, and on failure to so post such license or receipt, he or they so failing shall be considered as having no license and subject to all the pains and penalties as if no such license had issued.

Article 5060j. Every person, firm, corporation, or association of persons, before engaging in the sale of spirituous, vinous or malt liquors, or medicated bitters capable of producing intoxication, in any county, subdivision of a county, justice precinct, town or city in which local option is in force, shall enter into bond in the sum of $2500, with at least two good and sufficient sureties, payable to the State of Texas, to be approved by the county judge of the county in which such sales are to be made, conditioned that said person, firm, corporation, or association of persons, so selling spirituous, vinous or malt liquors, or medicated bitters capable of producing intoxication, shall not sell in any quantity, except on the prescription of a regular practicing physician, addressed to such person, firm, corporation, or association of persons, written with ink on white paper in the handwriting of such physician, dated numbered, and signed by such physician, giving his and applicant's place of residence, and certifying on his honor, that he has in person carefully examined the applicant or patient, and that he finds him or her actually sick, giving the malady or disease with

which he or she is suffering, as near as he can ascertain, and that he or she is in immediate need of an alcoholic stimulant, such as prescribed; and there shall not be sold more than one quart on any one prescription, which shall be sold at one time and in one package, and delivered to the purchaser at time of sale, and that he or they shall not permit the same to be drunk on the premises where sold, nor on any other premises owned or controlled by him or them; and that he or they shall not sell more than once on the same prescription and shall not sell on any prescription bearing the same number of another prescription given by the same physician and dated during the same year; and that he or they shall not sell on a prescription bearing date more than three days prior to the date of its presentation nor upon the prescription of a physician not known to him or them to be a regular practicing physician, authorized under the laws of Texas to practice his profession, nor permit a minor to remain on his premises or his place of business, except the house or place of business of a regular pharmacist; and that he or they shall not permit any games prohibited by the laws of this State to be played, dealt, or exhibited in or about such house or place of business; and that he or they shall not rent or let any part of the house or place of business or premises in which or on which they are selling such liquors or medicated bitters, to any one, for the purpose of carrying on any business in violation of the local option laws or the penal laws of the State; and that he or they shall not adulterate the liquors or medicated bitters sold by him or them, nor knowingly sell or give away such adulterated liquors; and that he or they shall keep an open, orderly house, and shall not use any screen or other device for the purpose of or which shall obstruct the view through the door or doors opening out on the street or alley; which said bond shall be filed in the office of the county clerk of the county where such business is carried on, and recorded by him in a book to be kept for that purpose; and for recording same he shall receive a fee of 75 cents. For every breach or violation of any of the provisions of said bond, the person, firm, corporation, or association of persons, and the sureties on said bond, shall be liable in damages to any person, firm, corporation, or association of persons, injured thereby. In addition to the proceedings by parties sustaining damages by the violation, it shall be the duty of the county and district attorneys to institute suit in the name of the State of Texas for each and

every infraction or violation thereof, for the use and benefit of the county, and the sum of $250 shall be recovered for each infraction against the principal and sureties on said bond, as liquidated damages, which said sum shall be paid into the county treasury and become a part of the road fund of said county. Said bond shall not be void on the first recovery, but may be sued upon for each infraction thereof until the full penal sum named therein shall be exhausted. If said bond shall be exhausted or become in danger of being exhausted by suits, said person, firm, corporation, or association of persons, shall be required to execute another bond; notice of such requirement shall be given by the county judge of the county, and such parties shall have ten days after notice to comply and upon failure to do so shall be subject to all the pains and penalties from the time such notice was given as if no bond had been given in the first instance. Provided, that in case the county judge shall fail to give the notice herein required, then any citizen of the county, over the age of twenty-one years, may do so, and in case of failure to execute another bond within the time required, as above set forth, said person may bring suit in the district court of the county to require such person, firm, corporation, or association of persons, to execute a new bond. Provided, further, that in case the sureties on such bond shall become insolvent, or found to be insolvent after the execution of such bond, it shall be the duty of the county judge of the county to require of them a new bond, the same as above set forth, and in case of his failure to do so, any citizen, as above set forth, may proceed in the district court aforesaid to compel them to execute such bond, and in case the insolvency of said sureties or either of them is established, which shall be done under the rules of evidence governing other like cases, or in case it is shown that said bond is exhausted or in danger of being exhausted by suit, said court shall enter up its judgment requiring said parties to enter into a new bond within ten days from the date of the judgment, and adjudge the cost against defendants, and assess a reasonable attorney's fee against them as cost. In case of an appeal from such judgment the bond shall be in an amount sufficient to cover all costs and damages, to be fixed by the judge trying the cause; and in addition to the conditions now required in appeal bonds, be continued further to pay all damages occasioned by the breach or violation of the local option and penal laws of the State from the date of

the institution of the suit until the final termination of such suit. In case appellants are cast in the suit and the same is finally determined against him or them, said appeal bond may be sued upon and recoveries had the same as provided in this chapter and article for suits and recovery on the original bond. Provided, further, that when suit is instituted hereunto by a citizen, the suit shall be prosecuted without bond for cost on [or] appeal bond.

SEC. 2. The near approach of the close of the present session of the Legislature, and the crowded condition of the calendar, and the importance of the raising additional revenue for the State, and the justness of dealing with all liquor dealers alike, create an emergency and an imperative public necessity requiring the suspension of the constitutional rule requiring bills to be read on three several days, and that this act take effect and be in force from and after its passage, and it is so enacted.

AUTHORITIES.

American Sugar Refining Co. v. Louisiana, 177 U. S., 89.
Reyman Brewing Co. v. Brister, 179 U. S., 445.

ARGUMENT.

The sole basis of the charge of discrimination is Article 5060i, Revised Statutes of Texas of 1895, which is the same as Section 13a of the Acts of 1893, same being as follows:

"The provisions of this chapter shall not apply to wines produced from grapes grown in this State, while the same is in the hands of the producer or manufacturers thereof."

The counsel for plaintiffs in error take the anomalous position that this provision (assuming for the purpose of argument that it is a discrimination) would not make the statute repugnant to the Fourteenth amendment to the Constitution of the United States, as a matter of *taxation* of the liquor traffic, but does make it violative of that amendment as to the matter of *regulation* of that traffic. In other words, if the statute only provided for an occupation tax upon those engaged in the sale of spirituous, vinous and malt liquors, this provision would not be discriminatory, but as the statute which imposes the *tax* also *regulates* the occupation by requiring a bond securing the mode and manner in which it may

be conducted, there is a discrimination, which is in conflict with the amendment. We are at a loss to know by what process of reasoning they arrive at this conclusion. It is conceded that the provisions of the statute, imposing the occupation tax upon those engaged in selling spirituous, vinous and malt liquors are valid, notwithstanding the exception exempting wines made from grapes grown in Texas, while in the hands of the producer or manufacturer; but when the State, in the exercise of its police powers, undertakes to throw around a business, the pursuit of which is universally restricted, regulations to promote the peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, a provision of a statute otherwise harmless, immediately becomes repugnant to the Fourteenth Amendment to the Constitution of the United States, and deprives a citizen of the equal protection of the laws! The police power of the State is as plenary as the taxing power, and all property subject to the taxing powers is subject to the regulation of the police power. (Kidd v. Pearson, supra.) The constitutional guaranties of the Fourteenth Amendment to the Constitution of the United States, that no State shall deny to any person within its jurisdiction the equal protection of the laws, were not intended to limit the subjects upon which the police power of a State may lawfully be exerted, for these guaranties have never been construed as being incompatible with the principle, equally vital, because so essential to peace and safety, that all property is held under the implied obligation that the owner's use of it shall not be injurious to the public.

Jones v. Brim, 165 U. S., 180.
Powell v. Pennsylvania, 127 U. S., 678.

The Fourteenth Amendment is not the "scarecrow" it is often represented to be; it does not overthrow State laws, rights and remedies to the extent and purposes for which it is often cited. (Anderson v. Henry, 45 W. Va., 319.)

Chief Justice Taney long ago said, in the License Cases, 5 How., 577, that "If any State deems the retail and internal traffic in ardent spirits injurious to its citizens and calculated to produce idleness, vice or debauchery, I see nothing in the Constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether if it thinks proper."

This court held, in the case of Barbier v. Conley, 113 U. S., 27, that the Fourteenth Amendment did not have the effect to take from the States of the Union those powers that were reserved at the time the original Constitution was adopted. In this case the court used this language:

"But neither the amendment, broad and comprehensive as it is, nor any other amendment was designed to interfere with the power of a State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity.

The case of Mugler v. Kansas, 123 U. S., 623, is an elaborate discussion of the extent of the police power of the State in the regulation of the sale of intoxicating liquors. The general question in the case was, whether the statutes of Kansas were in conflict with that clause of the Fourteenth Amendment which provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law.

In passing upon the extent of the police power of a State in regard to the regulation of the liquor traffic, the court held that there was no justification for holding that a State under the guise of police regulations was aiming to deprive a citizen of his constitutional rights. Neither could it be said that a State government interferes with or imposes upon anyone's constitutional rights when it determines that the manufacture or sale of intoxicating drinks, for general or individual use, constitute a business in which no one may lawfully engage, and it could not be supposed that the States intended by adopting the Fourteenth Amendment to impose restraints upon the exercise of their powers for the protection of the safety, health and morals of the community.

In the case of the American Sugar Refining Company v Louisiana, supra, a State statute was involved imposing a license tax upon persons and corporations carrying on the business of refining sugar and molasses. The statute exempted from the tax "planters and farmers grinding and refining their own sugar and molasses." It was contended that the exemption made the Act invalid because it denied the equal protection of the laws guar-

anteed under the Fourteenth Amendment to the Constitution of the United States.

The court held that the Act was not invalid, and that the State might, if it chose, exempt certain classes of property from taxation altogether, and might impose a different tax upon different trades and professions, and vary the rates of excises upon various products, and that all such regulations, so long as they proceed within the reasonable limits of general usage, are within the discretion of the State Legislature or the people of the State in framing their Constitution.

This case was followed by the Supreme Court of this State in the case of Douthit v. State, 83 S. W., 795.

In the case of Reyman Brewery Company v. Brister, 179 U. S., 451, there was involved a tax upon the business of trafficking in spirituous, vinous, malt or any intoxicating liquors.

In defining the phrase "trafficking in intoxicating liquors," it was provided in the statute that it did not include the manufacture of intoxicating liquors from the raw material and the sale thereof at the manufactory. It was contended that this provision of the law was a discrimination between foreign and domestic dealers in intoxicating liquors. The court in passing upon the question held that it was not a discrimination, and used this language:

"In exempting sales in quantities exceeding one gallon at the place of manufacture, and in imposing the tax upon such sales, when made at places elsewhere, the Legislature of Ohio was, in the exercise of its police power, aiming to restrict the evils of saloons or places where liquors are drunk. By imposing the tax upon the latter, the law, to some extent, is calculated to lessen an acknowledged source of vice and disorder."

The court affirmed the decision of the Supreme Court of Ohio and quoted approvingly the following from the case of Adler v. Whitbeck, 44 Ohio State, 539:

"It was for the Legislature to determine the forms of the traffic that required to be regulated as a source of evil. It has, in a measure, drawn a line between a distillery and brewery, on the one hand, and a saloon on the other. There is nothing unreal in the distinction. It is known by all men, and, in one respect, probably too well by many men, and, unless absolute prohibition is resorted to, no more practical distinction could be made."

A discrimination is not invalid, even under the taxing power of

the State, unless it is arbitrary, oppressive or capricious, and a statute which contains a discrimination founded upon a reasonable distinction in principle will be upheld.

If a State, within the limits of a reasonable distinction in principle, can discriminate in the matter of taxation, equally so can a discrimination, so based, be made in the matter of selecting occupations to be placed under the visitation of its power to protect the peace, morals, and good order of her people.

There can be no controversy as to the existence of a reasonable distinction in principle, between the occupation of a man who cultivates and produces the grapes out of which he manufactures the wine, and that of a man who sets up a dramshop, buying and selling wines and other intoxicants out of which he can make the better profit. The one is engaged in promoting the industries of the State. His right to sell is clearly an incident to his right to produce and manufacture. (American Sugar Refining Co. v. Louisiana, *supra.*) The other is engaged in a business universally recognized to be detrimental to the peace, morals, and good order of society, and uniformly subjected to stringent police supervision.

The man in the "homespun" shirt, enduring the cold of winter during the season of pruning, and the scorching heat of a Texas summer sun during the season of gathering and treading "his wine press alone" during the season of manufacturing, is not engaged in the same business under like conditions as the "man of the white apron," who prescribes "Parker's Rye" for the winter's cold, and that which "made Milwaukee famous," for the summer's heat, and whose season of "treading the wine press" is spent around the domino table, with those who "pay the freight."

The "gilded hell" painted by counsel for plaintiff in error, presided over by his "Satanic Majesty," the producer of Texas grapes and manufacturer of Texas wine, would be hot, indeed, did not our penal statutes deprive it of "brimstone." Under Article 100, Penal Code, he can not sell or give, or cause to be sold or given, any vinous liquors to any person under the age of twenty-one years. He can not permit games prohibited by law to be played in his house. (Art. 389, Penal Code.) He can not rent his house or any portion thereof to a gambler. (Art. 390, Penal Code.) If he has a pool or billiard room he can not allow a minor to enter it. (Art. 382a, Penal Code.) In fact he is encompassed by every provision of the Penal Code which surrounds the

dealer in other intoxicating liquors. There are only two exemptions in favor of the man who sells wine which he manufactures from grapes grown in Texas:

First. Exemption from the payment of an occupation tax as a liquor dealer, which is conceded to be valid.

Second. Exemption from giving a bond as a liquor dealer, which is contended to be invalid.

3.

THE PLAINTIFFS IN ERROR NOT BEING ENGAGED IN THE SALE OF WINES EXCLUSIVELY, BUT BEING ALSO ENGAGED IN THE SALE OF OTHER INTOXICATING LIQUORS THAN WINES, CAN NOT CHALLENGE THE VALIDITY OF THE TEXAS STATUTES.

STATEMENT.

Plaintiff in error P. O. Cox made application for license to sell "spirituous, vinous, or malt liquors or medicated bitters." (Tr., p. 8.) His bond is an obligation relating to the conduct of "house or place for the sale of spirituous, vinous, or malt liquors or medicated bitters capable of producing intoxicating liquors." (Tr., p. 9.) He engaged in the sale of whisky and beer. (Testimony of W. W. Thompson, Tr., pp. 13-20.)

AUTHORITIES.

Tiernan v. Rinker, 102 U. S., 123.
Powell v. State, 69 Ala., 13.
McCreary v. State, 73 Ala., 482.
Bogan v. State, 84 Ala., 150.

ARGUMENT.

In the case of Tiernan v. Rinker, *supra*, there was involved the construction of an Act of the Legislature of Texas, approved June 3, 1873, which levied an occupation tax upon all persons "pursuing the occupation of selling spirituous, vinous, malt and other intoxicating liquors." The Act contained the following proviso: "Provided, that this section shall not be construed as to include

any wines or beer manufactured in this State, or when sold by druggists for medicinal purposes."

The facts developed that plaintiffs in error in that case were not engaged in the *exclusive* sale of *wines and beer*, but were also dealers in other intoxicating liquors. The case involved the validity of the tax.

This court said: "If a party be engaged exclusively in the sale of these liquors [wines and beer] or in any business for which a tax is levied because it embraces the sale of them, he may justly object to the discriminating character of the act, and on that account challenge its validity; * * * but if engaged in the sale of other liquors than beer and wines, he can not complain of the State tax on that ground."

The record in this case showing that plaintiff in error P. O. Cox was engaged in the sale of *spirituous and malt liquors*, (Tr. pp. 13 to 20), and was not engaged in the sale of *wines exclusively*, he cannot challenge the validity of the statute.

We respectfully submit that the judgment should be affirmed.

Charles K. Bell

R. V. Davidson Atty. Gen'l of Tex.

Lecande Record Asst. " " " "

For Defendant in Error, the State of Texas.

Supreme Court of the United States.

Nos. 266 and 267.—October Term, 1905.

266.	P. O. Cox, Sam Levy, and W. M. Evans, Plaintiffs in Error, *vs.* The State of Texas.	In Error to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas.
267.	P. O. Cox, Sam Levy, and W. M. Evans, Plaintiffs in Error, *vs.* W. B. Thompson.	

[May 21, 1906.]

Mr. Justice Holmes delivered the opinion of the Court.

These are two suits upon a statutory bond executed by the plaintiffs in error as principal and sureties. There were verdicts and judgments against the plaintiffs in error, whereupon motions were made for new trials, setting up that the act under which the bond was given was contrary to the Fourteenth Amendment of the Constitution of the United States as denying to persons within the jurisdiction the equal protection of the law. The motions were overruled, and an appeal was taken to the Court of Civil Appeals. That Court affirmed the judgments below, 85 S. W. Rep. 1199; id. 34, a motion for a rehearing was overruled, an application for a writ of error was refused by the Supreme Court of the State, and thereupon the cases were taken to this Court.

The bond in suit was given by a liquor seller and was conditioned, among other things, against selling intoxicating liquors to minors, or allowing minors to enter and remain in the obligor's place of business. The breaches found were breaches of the conditions recited. These suits were brought by the defendants in error respectively, the State of Texas, and the parent of the minor. They seem to have been tried together, and the records are so similar that they properly have been treated by counsel as one.

The Statutes of Texas provide for taxes on sellers of spirituous, vinous or malt liquors, or medicated bitters. Rev. Civil Sts. 1895, Arts. 5060*a*, 5060*b*. They require an application for a license, giving details, a payment of the annual tax as a condition of obtaining the same, and the giving of a bond like the one in suit. Arts. 5060*c*–5060*g*. See amendments, St. 1897, c. 158; 1901, c. 136. They also enact, however, that "the provisions